UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER,	:	
	:	**Case No. C2-03-665**
Plaintiff,	:	
	:	**Judge Holschuh**
v.	:	
	:	
NATIONAL FOOTBALL LEAGUE, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO THE NFL DEFENDANTS' MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The NFL's Supplemental Memorandum focuses mainly on plaintiff Kelci Stringer's theory that the NFL acted negligently by publishing unreasonable and inadequate Hot Weather Guidelines in its Game Operations Manual. This Memorandum, therefore, also will focus mainly on the NFL's Hot Weather Guidelines. By doing so, we do not mean to suggest the NFL's Hot Weather Guidelines constitute the only possible factual basis for concluding that the NFL owed a common law duty of care to Korey Stringer.

It is important to note that the NFL's Hot Weather Guidelines did not emerge from discovery in this case. They were produced by the NFL pursuant to a third-party subpoena in the Minnesota case. Discovery in this case has largely been stayed. Therefore, we do not yet know all of the NFL's other undertakings regarding heat illness among its players. Facts could yet emerge reinforcing the existence of duties of care under the common law, again having nothing to do with the Collective Bargaining Agreement. The complaint certainly suggests other ways in

which the League assumed relevant legal duties to Stringer that had nothing to do with the Collective Bargaining Agreement, such as the League's approval of the Riddell equipment. See Section D, infra. Given the lack of an opportunity for plaintiffs to conduct full discovery to date, the tenor of the Court's questions on December 12, 2005, and the substance of the NFL's Supplemental Memorandum, plaintiff recognizes that this Memorandum must focus mainly on the NFL's assumed duty of care arising out of the Hot Weather Guidelines, in order to furnish the Court with a sound basis for ruling on the current motion to dismiss.

A. What Plaintiff Has Learned To Date About The NFL's Hot Weather Guidelines

The limited discovery that Kelci Stringer was permitted to conduct following the December 12, 2005 hearing shed some light on the origin of the Hot Weather Guidelines, although much remains to be learned from further discovery. In response to plaintiff's discovery, for example, the NFL acknowledged that the Hot Weather Guidelines were prepared by Dr. Ralph Goldman, an NFL consultant. Exhibit 1 to Affidavit of Paul M. De Marco, NFL's Objections and Responses to Plaintiff's Second Set of Interrogatories and Requests for Production, p. 2. Although plaintiff requested the information, the NFL did not – or perhaps could not – state when or under what circumstances Dr. Goldman had prepared them. That apparently must await Dr. Goldman's deposition. Instead, the NFL responded "that the Hot Weather Guidelines were first published in the 1991 Game Operations Manual." Exhibit 2 to Affidavit of Paul M. De Marco, NFL's Supplemental Response to Plaintiff's Second Set of Interrogatories, p. 1. This new information is significant because it proves that the NFL's Hot Weather Guidelines existed for two years before the Collective Bargaining Agreement (CBA)

came into existence. Based on the copy that the NFL provided to the Court and plaintiff's counsel at the December 12, 2005 hearing, the CBA was entered into on May 6, 1993.

B. The Law On "Duty"

In her previous Memorandum in Opposition to the NFL's Motion to Dismiss, Kelci Stringer offered the following analysis of the "duty" issue:

> The elements of ordinary negligence are well settled. To prevail on such a claim, a plaintiff must show the existence of a legal duty, a defendant's breach of that duty, and injury as a proximate cause of the defendant's breach. *Wallace v. Ohio Dept. of Commerce* 96 Ohio St.3d 266, 274 (2002); *Mussivand v. David*, 45 Ohio St.3d 314 (1989). . . . Under the common law, "[a]ny number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall." *Mussivand*, 45 Ohio St.3d at 318 (internal citations and quotation marks omitted). The common-law duty of care is that degree of care which an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances. *Id.* at 318-19. A person is to exercise that care necessary to avoid injury to others. *Id.* It is well settled that a voluntary act gratuitously undertaken must be performed with the exercise of due care under the circumstances. *Glanzer v. Shepard*, 233 N.Y. at 239, 135 N.E. at 276; *Briere v. Lathrop Co.*, 22 Ohio St. 2d 166, 171-172 (1970); *Thomas v. Tennessee Valley Authority*, 769 F. 2d 367, 370 (6th Cir. 1985); *Bloom v. New York*, 78 Misc. 2d 1077, 1078, 357 N.Y.S.2d 979, 981 (1974); Prosser, *Law of Torts* (3d ed.), p. 339; *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 821-22 (1975); *see also* Restatement of Torts (Second), §§ 323, 324A. This most basic tort duty arises by operation of law and applies to every person in society, regardless of the identity of the wrongdoer or the victim.

Plaintiff's Memorandum in Opposition to the NFL Defendants' Motion to Dismiss (Doc. 13), p. 23.

In its Supplemental Memorandum, the NFL chose to disregard plaintiff's reliance on *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922), *Briere v. Lathrop Co.*, 22 Ohio St. 2d 166, 171-172 (1970), *Thomas v. Tennessee Valley Authority*, 769 F. 2d 367, 370 (6th Cir. 1985), *Bloom v. New York*, 78 Misc. 2d 1077, 1078, 357 N.Y.S.2d 979, 981 (1974), Prosser,

Law of Torts (3d ed.), p. 339, *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 821-22 (1975), and Restatement of Torts (Second), § 323. The NFL would only acknowledge and discuss plaintiff's reliance on Restatement of Torts (Second), § 324(b). The NFL does so apparently to limit the Court's analysis of Restatement section 324A(b) to that contained in an almost thirty-year old FTCA case from the Eastern District of Pennsylvania. See Section D, infra.

The NFL's reliance on an FTCA case applying Pennsylvania law raises this threshold question: what state's law applies to the NFL's duty regarding the Hot Weather Guidelines? The NFL briefly postulates that, if any state's law – presumably as opposed to § 301 – applies to this "duty" issue, it must be that of either Minnesota or New York. Supplemental Memorandum, p. 8 n. 4. The NFL's unanalyzed and inconclusive choice-of-law argument fails to take into account that a federal court exercising diversity jurisdiction must apply the choice-of-law rules of the state in which it sits. *Mecanique C.N.C., Inc. v. Durr Environmental, Inc.*, 304 F.Supp.2d 971, 975 (S.D. Ohio 2004).

Under Ohio law, before engaging in any choice-of-law analysis, a court first must determine whether such an analysis is even necessary. *Id*. If the forum state and the other states in play would use the same rule of law or would otherwise reach the same result on a particular issue, it is unnecessary to make a choice-of-law determination with respect to that issue because there is no conflict of law on the issue. *Id*. In that situation, a federal court sitting in Ohio under diversity jurisdiction simply applies Ohio law to the particular issue. *Id*.

Because the NFL is asking this Court to apply either New York's law or Minnesota's law on "voluntarily undertaken duties," Supplemental Memorandum, p. 8 n. 4, the League is required to demonstrate that such laws actually conflict with the law of Ohio on this point. *Id.* Perhaps with this in mind, at the hearing on December 12, the Court asked the NFL's counsel, Mr. Levy,

if the common law of Ohio and that of Minnesota were the same regarding the existence of the duty asserted by plaintiff. Transcript of December 12, 2005 Hearing, p. 18. Mr. Levy replied that he assumed it was the same. *Id*. At the same hearing, plaintiff's counsel, Mr. De Marco, argued that "the law of Ohio and the law of Minnesota have developed that one who acts by injecting himself into a situation, such as the NFL did here, the situation being hot weather and practicing, must do so non-negligently or reasonably." *Id*. at 36-37. In its Supplemental Memorandum, the NFL failed even to attempt to demonstrate a conflict between Ohio's law on this subject and that of either Minnesota or New York. The closest the NFL came was footnote 4 at page 8 of its Supplemental Memorandum, which indicates that the law of Minnesota and the law of New York do not differ on this topic. Supplemental Memorandum, p. 8 n. 4. Because the NFL has not demonstrated the requisite conflict, Ohio law would apply to the issue of "voluntarily undertaken duties." *Mecanique C.N.C., Inc.*, supra, 304 F.Supp.2d at 975.

In any event, based on plaintiff's research, the relevant case law on "voluntarily undertaken duties" appears to be the same in Ohio, Minnesota, and New York. All three states recognize the common law duty of care originally articulated by Justice Cardozo in *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922): "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." See, e.g., *Johnson v. Dumech*, 82 N.E.2d 297, 299, 52 Ohio Law Abs. 161 (1948) ("It is ancient learning that one who assumes to act even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. . . . [The defendant] is charged with liability because, having chosen to perform, he has thereby become subject to a duty in respect of the manner of performance."); *Briere v. The Lathrop Co.*, 22 Ohio St.2d 166, 172, 258 N.E.2d 597, 602 (1970) (citing, *inter alia*, *Abresch v. Northwestern Bell Tel.Co.*, 246 Minn.

408, 75 N.W.2d 206 (1956)); *Thelen v. Spilman*, 251 Minn. 89, 96-97, 86 N.W.2d 700, 706 (quoting *Glanzer* and citing, *inter alia*, *Judt v. Reinhardt Transfer Co.*, 32 Ohio Op. 161 (1945)). And all three states also follow Restatement sections 323 and 324A, although they do so in addition to, and not to the exclusion of, the common law principle quoted above.[1] See, e.g., *Seley v. G. D. Searle & Co.*, 67 Ohio St.2d 192, 202, 423 N.E.2d 831, 839 (1981) (citing *Briere* as holding that "one who gratuitously undertakes a voluntary act assumes the duty to complete it with the exercise of due care under the circumstances" and separately quoting section 323); *Wissel v. Ohio High School Athletic Assn.*, 78 Ohio App.3d 529, 605 N.E.2d 458 (1992) (discussing sections 323 and 324A in a case involving athletic associations' failure to prescribe proper safety regulations for football players); *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 822 (1975) (quoting *Glanzer* and separately citing section 323); *State v. Philip Morris Inc.*, 551 N.W.2d 490, 493-494 (Minn. 1996) (quoting *Glanzer*, citing *Thelen* and *Isler*, and stating that "[t]he Restatement has reflected" the "principle" that they recognized); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-807 (Minn. 1979) (relying on *Isler*, but also citing sections 324A and 323 as similar); *Cline v. Avery Abrasives, Inc.*, 96 Misc.2d 258, 270-271, 409 N.Y.S.2d 91, 99 (1978) (stating that *Glanzer* has been "reaffirmed," but also citing section 324A).

C. Applying The Law On "Duty" To What We Currently Know About The Hot Weather Guidelines

For purposes of the current motion to dismiss, it suffices that the claimed duty of care emanates from the legal principles discussed above, rather than from the CBA, and that the Court can resolve the entire negligence claim on which this duty is based without having to interpret the

[1] The caveats to sections 323 and 324A both leave room for other situations in which voluntary undertakings could give rise to duties of care.

CBA. Because only limited discovery has taken place thus far, plaintiff has not had access to all of the evidence that ultimately will be presented on the various elements of negligence. As plaintiff's counsel stated during the December 12 hearing, the question whether the NFL owed a duty depends solely on the common law. At some point, the Court would have to determine if the law supports the claimed duty, but in no event would the Court have to interpret the CBA to answer that question.

From plaintiff's present vantage point, we can say this much to assuage any concerns the NFL might have concerning this point: plaintiff maintains that the legal principles discussed above form the foundation of the legal duty under discussion. These principles are, to quote Justice Cardozo, "ancient." Having been embraced by the courts of Ohio, Minnesota, and New York, the ancient legal principles discussed above support full recognition of the duty of care that plaintiff intends to establish in this case regarding the NFL's Hot Weather Guidelines. Neither the claimed duty nor its factual underpinnings have anything to do with the CBA. Plaintiff has not suggested – and will not suggest – that the claimed duty is linked to the CBA. Proof positive of this is the fact that the legal duty of care stemming from the Hot Weather Guidelines (i.e., voluntarily prescribing heat standards for NFL teams to follow) arose at least ***two years before*** the labor contract that the NFL characterizes as the only possible source of any legal duty.

The NFL's Supplemental Memorandum does not mention or attempt to deal with this timing problem. Rather, the League argues for the first time that, even if it undertook a duty of care to NFL players such as Korey Stringer by publishing Hot Weather Guidelines in its Game Operations Manual, that duty would be irrelevant to this case because the Game Operations Manual applied only to NFL ***games***, not NFL ***training camp practices***. The NFL's Supplemental Memorandum states that its "Game Operations Manual, in which the Hot Weather Guidelines

appear, has no application whatsoever to clubs' preseason training camps."[2] NFL Supplemental Memorandum, pp. 9-10. The NFL maintains that this Manual "regulates only the conduct of NFL games . . . ." *Id*. at 1 (emphasis original).[3]

One need look no further than the four corners of the NFL's Hot Weather Guidelines to know that, by promulgating, publishing, and distributing them, the League was giving NFL teams and their employees specific directions on how to prevent, identify, evaluate, and treat heat illness among players during practices in high heat, the vast majority of which logically take place at training camps.

The wording of the directions given shows that some were addressed to NFL players themselves. For example, the Hot Weather Guidelines state: "The problems result from producing more heat than you lose," "Maximize sweat losses by drinking as much cool water as you can," and "Keep cool before you go on the field." Plaintiff will contend that, by giving NFL players specific directions on how to protect themselves from heat illness, the NFL undertook a duty of care to the League's players, including Korey Stringer, which required the NFL to use reasonable care in giving such directions. *Glanzer* and its progeny support such a duty of care

[2] The NFL states, in the present tense, that its Game Operations Manual "has" no application to training camps. But the League has refused to produce its current Game Operations Manual, asserting that "information for the time period after July 31, 2001" is "not relevant nor admissible in this action." Exhibit 1, NFL Objections and Response to Plaintiff's Second Set of Interrogatories and Requests for Production, p. 1. Dr. Elliot Pellman, who chaired a special NFL committee regarding heat following Korey Stringer's death, testified at his deposition in the Minnesota case that the NFL's hot weather guidelines were changed after July 2001. Exhibit 3, Excerpt of Testimony of Elliot Pellman, M.D., pp. 54-55. Contrary to the NFL's assertion, any changes in the guidelines related to NFL training camps would be relevant to the NFL's control, authority, or responsibility over training camp heat issues and, thus, would indeed be admissible under Evidence Rule 407.

[3] The NFL implies that Article XXXVII of the CBA gives each team complete discretion to conduct and administer its own training camp however it sees fit, with the exception of a few bargained-for rights. NFL Supplemental Memorandum, p. 5. Neither Article XXXVII nor any other provision of the CBA mentions any such discretion.

So, too, does Restatement section 323, inasmuch as plaintiff will prove that the League's negligent directions to players regarding heat illness and its causes, prevention, and treatment actually increased their risk of developing heat illness, above and beyond the risk they would have confronted had the League not injected itself into this issue at all. The directions to players in the League's Hot Weather Guidelines – and thus the legal duty arising therefrom – had absolutely nothing to do with the CBA, as evidenced by the fact that the Guidelines were published two years before the CBA existed.

Other directions contained in the NFL's Hot Weather Guidelines were addressed to the teams' coaching staffs and/or front offices. For example, the Hot Weather Guidelines state: "Coaches should consider rotating players in and out during game/practice" and "Individual playing/practice times should be adjusted to reduce average heat production." Still other directions contained in the NFL's Hot Weather Guidelines appear to have been addressed to NFL team trainers and physicians. For example, the NFL's Hot Weather Guidelines state: "Equipment men should have a supply of wet towels and 'Indian pumps' filled with cool water to wet down the players" and "Get players into cool shower as soon as possible after the game/practice." The Hot Weather Guidelines also told team trainers and physicians what to do "[i]f a player faints" due to heat illness. Plaintiff will contend that, by giving NFL coaching staffs and/or front offices specific directions on how to prevent heat illness among their players, the NFL undertook a duty of care to the League's players, which required the NFL to use reasonable care in giving such directions. Plaintiff also will contend that, by giving NFL team trainers and team physicians specific directions on how to prevent, identify, evaluate, and treat heat illness among NFL players, the NFL undertook a duty of care to the League's players, which, again, required the League to use reasonable care in giving such directions to the team

trainers and team physicians. *Glanzer* and its progeny again support such a duty of care. So, too, does Restatement section 324A(a) inasmuch as plaintiff ultimately will prove that the League's negligent directions to team coaching staffs, front offices, trainers, and physicians regarding heat illness and its causes, prevention, and treatment actually increased players' risk of developing heat illness, above and beyond the risk they would have confronted had the League not injected itself into this issue at all. Subsections (b) and (c) of Restatement section 324A also support such a duty inasmuch as plaintiff ultimately will prove that the Hot Weather Guidelines prescribed standards of prevention, evaluation, and treatment that otherwise were team responsibilities and that the Vikings are on record as claiming that they followed or exceeded NFL standards. Exhibit 4 to Affidavit of Paul M. De Marco, Letter dated January 14, 2002 from Vikings Vice President Mike Kelly to NFL Commissioner Paul Tagliabue, p. 12. As with the directions to players in the Hot Weather Guidelines, the directions in the Guidelines to team coaching staffs, front offices, trainers, and physicians – and thus the legal duty arising therefrom – had absolutely nothing to do with the CBA, as evidenced by the fact that the Guidelines were published two years before the CBA existed.

Commissioner Paul Tagliabue's deposition testimony in the Minnesota case, an excerpt of which is attached as Exhibit 5 to the Affidavit of Paul M. De Marco, refutes the notion, advanced by the NFL, that the Hot Weather Guidelines are irrelevant because they were not intended to apply to training camps. The Commissioner testified as follows:

> Q. Is heat during training camp one of the subjects that the NFL is empowered to create rules for?
> A. I think that the climatic conditions for playing the game ***and practicing*** are generally within the area that we have some responsibility and the authority for, yes.
> Q. Prior to the death of Korey Stringer, did you enact rules or did the NFL enact rules governing how teams needed to handle heat during training camp?
> A. I think we had some guidelines or policies on the matter, yes.

Q. Do you know where those were contained?
A. ***In our administrative operations materials***.

Exhibit 5 to Affidavit of Paul M. De Marco, pp. 95-96 (emphasis added).[4] Sure enough, the Hot Weather Guidelines contained in the "Game Operations Manual" repeatedly referred to a team's "practice" during hot weather.

Commissioner Tagliabue's testimony verifying that the League had "guidelines or policies" on "how teams needed to handle heat during training camp," the actual references to "practice" in the NFL's Hot Weather Guidelines, and the incontestable fact that the hottest weather in which NFL players typically practice occurs during July/August training camps make it reasonable to conclude that the Guidelines were intended to apply not only to NFL games but also to NFL training camp practices. Stated differently, it would be incongruous to conclude that the NFL's Hot Weather Guidelines, which repeatedly referred to a team's "practice" in hot weather, were not meant to apply during the hottest part of an NFL team's practice schedule, July and August training camps.

Even beyond the Commissioner's testimony and the wording of the Hot Weather Guidelines themselves, a review of the NFL's Game Operations Manual indisputably exposes the fallacy of the NFL's argument that the Manual "regulates only the conduct of NFL games" and "has nothing to do with the member clubs' training camps." NFL Supplemental Memorandum, p. 1 (emphasis original). In fact, the Game Operations Manual contains provisions regulating many

[4] Neither the NFL nor the Commissioner has ever identified any "administrative operations materials" other than the Game Operations Manual that contained the League's Hot Weather Guidelines in 2001. The Game Operations Manual is Volume II of a four-volume set entitled "Policy Manual for Member Clubs." Judging from their titles, other volumes in the set appear to deal with administrative operations, but the Game Operations Manual is the only volume as yet produced by the NFL. Needless to say, the other volumes may also contain provisions regulating aspects of training camp.

activities of NFL teams and players, not merely the activities that occur on game day.[5] Among such provisions are guidelines for activities directly affecting player health that occur at practices and training camps. For example, in addition to the Hot Weather Guidelines, the Game Operations Manual contains more than 20 pages of guidelines for NFL teams to follow in order to prevent bloodborne illnesses such as Hepatitis B and HIV-AIDS. Like the Hot Weather Guidelines, the "Exposure Control Plan" does not state that its precautions apply only on game day; to the contrary, it emphasizes that the prescribed safety measures also are meant to be followed at "practice facilities" and "training camp." See, e.g., Exhibit A to Declaration of Tim Davey, NFL Game Operations Manual, p. A 118 (prescribing "protective equipment . . . in [the Club's] locker rooms, training rooms, practice facilities and its game sites") and p. A 119 (prescribing safe "housekeeping" procedures for the Club's "locker rooms and training rooms, both at its practice facilities (including training camp) and its home game sites").

Despite the misleading title "Game Operations Manual," this document clearly prescribes measures to be followed by NFL teams in order to protect players like Korey Stringer from becoming ill, whenever and wherever they are on the job. The Manual contains guidelines to address NFL players' exposure to two categories of disease: bloodborne illnesses and heat-related illnesses. It only makes sense that such disease-prevention guidelines would apply not just during games – which amounts to only about 60 hours per NFL player per year – but also during the hundreds of hours NFL players spend practicing each year, including during training camp. For example, common sense suggests that the NFL's "Exposure Control Plan" for bloodborne illnesses would have to apply equally to games, practices, and training camps, since players arguably are just as susceptible to bloodborne illnesses at practices and training camps as

[5] For example, the "Game Operations Manual" purports to prescribe standards of conduct for players "on or off the field." Exhibit A to Declaration of Tim Davey, p. A 61.

they are on game day. Using similar reasoning, since NFL players are more susceptible to heat-related illnesses during July/August training camps than they are during NFL games, common sense suggests that the League's Hot Weather Guidelines must have been meant to apply during training camp practices as well as games. This certainly would be consistent with Commissioner Tagliabue's sworn testimony.

By choosing to prescribe Hot Weather Guidelines for NFL teams to follow at games, practices, and training camps, the NFL had the responsibility to prescribe reasonable and adequate guidelines for preventing, identifying, evaluating, and treating heat-related illnesses. A study published by the Gatorade Sports Science Institute entitled "Heat Stroke in Sports: Causes, Prevention and Treatment" demonstrates how grossly inadequate the NFL's Hot Weather Guidelines were at the time of Korey Stringer's fatal heat illness. For example:

- The Gatorade study stated, "Heat stroke is always a threat during hard drills on hot days, especially in hefty players in full gear." The study added, "So during a hard practice in full gear, heat stroke is possible at any combination of ambient temperature above 80º F (26.7º C) and relative humidity above 40% (Kulka & Kenney, 2002)." "Early warning signs of impending heat stroke may include irritability, confusion, apathy, belligerence, emotional instability, or irrational behavior." Exhibit 6 to Affidavit of Paul M. De Marco, pp. 1, 2. The NFL's Hot Weather Guidelines never mentioned heat stroke, what weather conditions create the risk of it, how to prevent it, or how to recognize it. Korey Stringer developed heat stroke while practicing in the hottest training camp weather in more than a decade.

- The Gatorade study stated, "Lack of acclimation is a cardinal predictor of heat stroke in football." Exhibit 6 to Affidavit of Paul M. De Marco, p. 1. The NFL's Hot Weather Guidelines never mentioned acclimation. As practice proceeded, Stringer displayed definite signs of lack of acclimation.

- The Gatorade study stated, "In studying 1,454 cases of heat illness in Marine-recruit training, researchers implicated heat stress on the prior day as a factor (*Kark* et al., 1996). So a prime time for heat stroke is the day *after* an exhausting and dehydrating day in the heat." Exhibit 6 to Affidavit of Paul M. De Marco, p. 1. The Gatorade study also stated that, for players suffering dehydration the prior day, "body temperature should be normal before the player takes the field. When in doubt, hold them out." *Id*. at 3. The NFL's Hot Weather Guidelines, however, do not mention when or under what conditions players

should be allowed to return to practice after heat exhaustion.[6] Stringer suffered heat stroke when he was allowed to practice one day after suffering heat exhaustion.

- The Gatorade study stated, "The football uniform insulates players. As more gear is added – from shorts and shirt to pads and helmet to full uniform – players heat up faster, get hotter, and cool slower." Exhibit 6 to Affidavit of Paul M. De Marco, p. 2. The NFL's Hot Weather Guidelines say nothing about the risks posed by full uniforms; players merely are advised to "wet your uniform and skin whenever possible with cool water." The day he developed heat stroke, Stringer practiced in full uniform.

- The Gatorade study stated, "The NFL has nearly 300 players who weigh 300 pounds or more, six times as many as a decade ago. Nor is extra fat the only bulk problem. When a 270-pound player adds 30 pounds of muscle, he can generate more heat, but he does not add enough extra surface area to shed that extra heat. So huge lineman can be heat bombs." Exhibit 6 to Affidavit of Paul M. De Marco, p. 2. The NFL's Hot Weather Guidelines mentioned nothing about giving special attention to heavier players. Stringer weighed more than 330 pounds in July 2001.

- The NFL's Hot Weather Guidelines stated, "Make certain the players take in enough water." But according to the Gatorade study, "Heat stroke in football sometimes seems to hit with surprising speed. When this happens, a common theme of bewildered staff is, 'But he got lots of fluids.' The misconception is that hydration prevents heat stroke. The truth is that hydrating is critical but not sufficient to prevent heat stroke." Exhibit 6 to Affidavit of Paul M. De Marco, p. 2.

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[6] That the NFL remains dangerously out of touch on this critical issue was further exemplified by Commissioner Tagliabue's deposition testimony on this subject during the Minnesota suit brought by the Stringer family. Referring to the heat exhaustion that Stringer suffered on July 30, 2001, the day before he developed heat stroke, the Commissioner testified as follows:

> Q. Would you expect an NFL team physician, in order to diagnose heat exhaustion, to actually examine the player?
>
> ****
>
> A. I don't know.
>
> Q. Would you expect an NFL team physician, before pronouncing a player recovered from heat exhaustion, to actually examine the player?
>
> ****
>
> A. I don't know.
>
> Q. Would you expect an NFL trainer to follow up with a player who had been diagnosed as suffering heat exhaustion?
>
> ****
>
> A. I don't know.

Exhibit 5 to Affidavit of Paul M. De Marco, pp. 50-51.

- The Gatorade study stated, "Some football players are overmotivated by pride and driven by tough coaches. They believe no limits exist. They ignore warning signs." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. That study added, "In football, focus on high-risk players. Spot subtle signs of physical of cognitive decline." *Id*. By mentioning nothing about monitoring players, the NFL's Hot Weather Guidelines perpetuated the dangerous myth that players can self-monitor in hot conditions. Stringer was left unmonitored the day after suffering heat exhaustion and having to leave practice, a time when he was most at risk of suffering heat stroke.

- The Gatorade study stated, "In heat stroke, every minute counts. When core temperature is very high, body and brain cells begin to die, so fast cooling is vital." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. The NFL's Hot Weather Guidelines mentioned nothing about how teams should respond to heat stroke. In a deposition in the Minnesota case, Commissioner Tagliabue testified: "Q. First of all, are you aware that time is critical in treating heat illness? . . . A. I don't know." Exhibit 5 to Affidavit of Paul M. De Marco, pp. 79-80. An ambulance was not called until at least 45 minutes after Stringer collapsed on the field at the end of practice.

- The Gatorade study stated, "Early features [of heat stroke] are subtle central nervous system (CNS) changes – altered cognition or behavior – and core temperature over 104-105º F (40.0-40.6º C). When an athlete collapses, the best gauge of core temperature is rectal temperature; oral, axillary, or ear-canal temperature will not do." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. The NFL's Hot Weather Guidelines call for teams to take the collapsed player's temperature orally or by "skin." Vikings trainers assessed Stringer by feeling his skin. His temperature was 108.8° when finally measured rectally at the emergency room almost an hour and a half after Stringer collapsed on the field.

- The Gatorade study stated, "Check the athlete every few minutes for rectal temperature, CNS status, and vital signs." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. The NFL's Hot Weather Guidelines never mentioned rectal temperature, CNS status, vital signs, or periodic checking. None of these measures was taken by Vikings trainers attending to Stringer.

- The Gatorade study stated, "No faster way to cool exists than dumping the athlete into an ice-water tub. Submerge the trunk – shoulders to hip joints." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. The NFL's Hot Weather Guidelines said nothing about ice-water immersion. Stringer was not immersed in ice water, even though an ice water pool was available just across the street from the trailer in which Stringer became comatose.

- The Gatorade study stated, "Send the heat-stroke athlete to the hospital after cooling." Exhibit 6 to Affidavit of Paul M. De Marco, p. 3. The NFL's Hot Weather Guidelines never mentioned the need to secure any medical care, let alone hospital care, for a player with heat illness. The call for an ambulance was delayed even after Stringer became unresponsive.

D. _____.

As discussed above, the NFL apparently is attempting to limit the Court's analysis of Restatement section 324A(b) to that contained in an almost thirty-year old FTCA case from the Eastern District of Pennsylvania. Pinning its hopes on *Blessing v. United States*, 447 F.Supp. 1160 (E.D. Pa. 1978), the NFL argues that the "well-settled" law surrounding Restatement section 324A(b) requires Kelci Stringer to show that the League undertook not to supplement the Minnesota Vikings' duty to Korey Stringer, but to supplant it altogether. NFL Supplemental Memorandum, p. 8.[7] The NFL claims that assessing whether plaintiff meets this supposed requirement mandates examining the CBA because, according to the League, the CBA is the only possible source of any duty that the Vikings owed to Korey Stringer. Thus, argues the NFL, the Court would have to examine the CBA to determine if the NFL undertook a duty that supplanted one owed by the Vikings. The NFL is incorrect in multiple respects.

As also discussed above, the NFL's argument completely disregards the forum's choice-of-law rules. Ohio's choice-of-law rules lead to application of Ohio law in this case because the

[7] In addition to *Blessing*, the NFL's Memorandum, at page 8, cites two cases discussing it, one applying Michigan law and the other, Tennessee law, both of which were cases arising under the FTCA, not diversity jurisdiction. The New York case cited at page 8 is inapposite because it is not based on the duty recognized in *Glanzer*, or Restatement section 323 or 324A. The NFL also attempts to cite an unpublished Minnesota court of appeals decision as representative of Minnesota law. Decisions of the Minnesota court of appeals do not establish the law in Minnesota. *Pulju v. Metro. Prop. & Cas. Co.*, 535 N.W.2d 608, 608 (Minn. 1995). Until the Minnesota Supreme Court expressly adopts a court of appeals decision, even one where further review is denied, that decision "does not represent a definitive statement of the law of Minnesota." *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996). The Minnesota Supreme Court also has emphasized the limited function of the court of appeals, in addressing the import of unpublished opinions. The court "stress[ed] that unpublished opinions of the court of appeals are not precedential. The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. Unpublished decisions should not be cited by the district courts as binding precedent." *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (citations omitted). The League also inexplicably cites a case applying Georgia law.

League, as the party asserting the applicability of another state's law, has failed to demonstrate that the forum's law on "duty" differs from such out-of-state law. The League offers no explanation for how application of Ohio's choice-of-law rules might ultimately result in applying an FTCA case that purported to apply Pennsylvania law.

The law of Ohio, Minnesota, or New York are uniform on the "duty" issue, including the particular aspect for which the NFL cites the *Blessing* case from Pennsylvania. The *Glanzer* line of cases offers no support for the NFL's "supplant" theory. More recently, an Ohio court applied section 324A to the situation analogous to this one, in which athletic associations failed to prescribe proper safety regulations for league teams and coaches to follow in protecting football players from injury. *Wissel v. Ohio High School Athletic Assn.*, supra, 78 Ohio App.3d at 541-542. The *Wissel* court never implied that section 324A could be applied only if the athletic associations completely relieved the teams and coaches of their duties to players. In *Thelen v. Spilman*, supra, 86 N.W.2d 700, the Minnesota Supreme Court rejected an argument similar to the one the NFL is making here. Citing *Glanzer*, the court held that a driver who voluntarily signals another driver that it is safe to proceed owes a duty of care. *Id*. at 706. The court so held even while recognizing that the driver receiving the signal still had a duty to make his own independent observation. *Id*. at 706. This is incompatible with the NFL's theory that the voluntarily undertaken duty must supplant the original duty.[8]

The other problem with the NFL's theory that the voluntarily undertaken duty, to be upheld, must supplant the original duty is that this theory does not advance the ball for the NFL in this case. The essential inconsistency in the League's argument is that, even while insisting

[8] *Blessing* apparently does not even represent the settled law of Pennsylvania or the Eastern District of Pennsylvania's or the Third Circuit's most recent views on it. *Santillo*, 603 F.Supp. 211 (E.D. Pa. 1985); see also *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1368-1369 (3d Cir. 1993) (citing *Wissel* extensively and with approval).

that the Court must search the CBA for evidence of the Vikings' original duty to aid Stringer, the NFL acknowledges that the CBA contains no language regarding that duty. Because the NFL points to no disputed wording on this issue in the CBA, the Court would not be impelled to interpret the CBA. *Livadas v. Bradshaw*, 512 U.S. 107, 122-124, 114 S.Ct. 2068, 2077-2078 (merely having to look in a CBA for evidence of a duty is not sufficient; the meaning of terms in the CBA must actually be "the subject of dispute"); see, e.g., *Brown v. NFL*, 219 F.Supp.2d 372, 383-387 (S.D. N.Y. 2002) . In truth, the Vikings' duty to aid Stringer emanated from well-settled common law principles. See, e.g., *Depue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (Minn. 1907).

Similarly unavailing is the NFL's attempt to downplay Riddell's special status. Essentially, the NFL argues that the League does not require players to wear Riddell equipment, but even if it did, that would be contained in the "NFL Rules," which the League claims are incorporated into the CBA. Parenthetically, the court in *Brown* properly rejected the same tortured argument that all NFL-related rules are incorporated into the CBA. *Brown v. NFL*, supra, 219 F.Supp.2d at 385-387. Moreover, the public record contradicts the NFL's attempt to portray Riddell as just another equipment manufacturer. For example, the NFL's special licensing relationship with Riddell is evident from the Riddell website's claim that Riddell is the "Official Helmet of the NFL" and that it has an exclusive agreement to provide "Riddell helmets and Power shoulder pads for NFL players" in exchange for "prominent display" of "the Riddell brand" during "televised NFL games," Exhibit 7 to Affidavit of Paul M. De Marco, as well as from the sports equipment industry's recognition of Riddell not only as "the official helmet for the NFL" but also as "the exclusive manufacturer of all licensed NFL helmet products." Exhibit 8 to Affidavit of Paul M. De Marco. Riddell's status vis-à-vis the NFL will have to be sorted out in discovery, but it is clear that the NFL approved and licensed Riddell's helmets and shoulder pads

and that this arrangement, which led to Stringer wearing such equipment, has nothing to do with the CBA. It too predated the CBA. As with the NFL's "supplant" theory, the League theory that the Court must examine the CBA for evidence regarding why Stringer was wearing Riddell equipment fails because, as the NFL is forced to admit, nothing about Riddell equipment is found in the CBA. Thus stripped of any relation to the real issue involved in the NFL's motion – § 301 preemption – the League's argument concerning Riddell equipment is nothing more than a premature attempt to convince the Court, before any discovery regarding Riddell and its relationship with the NFL takes place, that there is no factual dispute on that point.

CONCLUSION

Despite being given repeated opportunities to do so, the NFL remains unable to point to any language in the CBA that is in dispute, that creates any claimed duty or right, or that the Court would have to interpret. There simply is no nexus between the CBA and this case. For the reasons stated above and in our previous memorandum, the NFL's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2006 the foregoing was filed via the Court's electronic filing system, which automatically results in service by email upon all counsel of record.

/s/ Paul M. De Marco